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IN THE

Supreme Court of the United States

October Term, 1967

No. 393

LE ROY GARBER,

Appellant,

v.

THE STATE OF KANSAS,

Appellee.

On Appeal from the Supreme Court of the State of Kansas

BRIEF AND APPENDIX, *AMICUS CURIAE*, IN SUPPORT OF JURISDICTION OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

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This brief *amicus curiae* is submitted with the consent of counsel for both parties.

Interest of the *Amicus*

The National Committee for Amish Religious Freedom is an unincorporated association of the individuals listed in the appendix to this brief (*infra*, p. 15). They are united in a commitment to the principles of religious freedom and

share a deep concern that these principles be respected in their application to so unconventional a religious sect as the Amish. They deem it particularly appropriate to intervene because the doctrines of the Amish strongly discourage if indeed they do not forbid their own invocation of court action even in defense of the sect's religious freedom.

Scope of This Brief

The specific question presented in this appeal is whether a state can constitutionally punish a parent who for religious convictions does not require his 14-year-old daughter to attend a conventional public or parochial secondary school but instead provides for her continued education through a correspondence school and (simultaneously) an Amish home study program wherein the pupils are engaged together in educational activities under the direct supervision of a teacher only one morning each week.

This brief does not address itself to the merits of this question. In the event that the Court notes probable jurisdiction it is our intention again to seek leave to submit a brief *amicus curiae* in order to present our views on the merits. Here we address ourselves only to the question of jurisdiction and urge that the question presented is substantial, it is of national importance and it is one which only this Court can definitively resolve. Accordingly, we submit that probable jurisdiction should be noted.

ARGUMENT

1. The Issue of Pluralism

Initially we suggest that neither the substantiality of the question nor the national importance of its resolution is affected by the fact that the religious group involved is a small one. It is only where an assailed group is a small one that the issue of religious liberty is likely to come to the courts. The purpose of a Bill of Rights is to protect minorities; a major religious group does not usually need the First Amendment for its protection. The smaller the minority, the more likely it is to need judicial protection; the greater it is, the more likely it is to obtain the protection it needs through legislative exemption. It is the "discrete and insular" minority which has the right not only to invoke judicial protection but to demand a "more searching judicial inquiry" than when major groups are involved (cf. *United States* v. *Carolene Products*, 304 U. S. 144 footnote 4 [1938]).

Certainly the decisions of this Court give no indication of a reluctance to intervene where the affected religious group is small. The many Jehovah's Witnesses cases, upon which so much of today's law of religious liberty is based,[1] involved a small religious group. Sabbatarians protected in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) are likewise comparatively few in number. It is unlikely that more than a handful of Americans share the religious convictions of the woman whose refusal to serve on a jury was vindicated in *In re Jenison*, 375 U. S. 14 (1963). The religious

1. See, Waite, THE DEBT OF CONSTITUTIONAL LAW TO JEHOVAH'S WITNESSES, 28 Minnesota Law Review 213 (1944).

convictions of the young men in the conscientious objector cases (*United States* v. *Seeger*, 380 U. S. 163 [1965]) were all individualistic.

For the same reason substantiality and importance are not lessened by the fact that the beliefs of the Amish are unconventional and their practices do not conform to generally accepted standards. The First Amendment ban on laws respecting an establishment of religion or prohibiting its free exercise manifested an intention to accord constitutional protection to the nonconforming and unconventional religions, those which are not part of the general establishment. Indeed, the philosophy underlying the First Amendment was that religious diversity was not something to be merely suffered but to be welcomed. "We wanted a land," in the words of Mr. Justice Douglas, "where our people can be exposed to all the diverse creeds and cultures of the world."[2] Uniformity of religious opinion, said Jefferson, was no more desirable than uniformity of face or stature.[3]

Religious pluralism insures domestic tranquillity. "In a free government," said the author of the First Amendment, "security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."[4]

2. *Dennis* v. *United States*, 341 U. S. 494, 585 (1951) *dissent*.

3. In Notes on Virginia, Blau, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA, revised edition, p. 82.

4. Quoted in 1 Stokes, CHURCH AND STATE IN THE UNITED STATES, p. 348. Voltaire had written: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." Quoted *ibid*.

There was a time, particularly after World War I when nationalism was at its height and uniformity, political, religious and cultural, was deemed a greatly desired end. It was the era that was committed to the melting-pot theory whereby persons of different nationalities and cultures were transformed into the "American type." It was in this period that Congress enacted an immigration law containing a national origins quota system whose purpose it was to exclude persons, from eastern and southern Europe, whose ethnic and cultural backgrounds were deemed too radically different from the Anglo-Saxon norm. This, too, was the period in which states enacted laws seeking to outlaw or make difficult the establishment of private schools or the teaching of foreign languages.

The decisions of this Court recognized then that insofar as American citizens were affected, cultural uniformity could not constitutionally be imposed coercively.[5] But

5. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1925); *Farrington* v. *Tokushige*, 273 U. S. 284 (1927). Cf. *Stainback* v. *Po*, 336 U. S. 368 (1949). In the *Pierce* case this Court found itself unimpressed by the following argument made by the attorney general of Oregon:

> "The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?"

even in the area of immigration, where the plenary powers of Congress are not subject to judicial scrutiny,[6] the recent elimination of the national origins quota system[7] testifies to radical change in national policy. We now recognize that unity and uniformity are not synonymous; that unity may lie in diversity; that we are a nation not only of people but of peoples; that American culture is a plurality of cultures.

The unconventionality and unorthodoxy of the Amish, therefore, not only do not negate the importance of the questions raised in this appeal, but on the contrary underline it. For implicit in this controversy is the extent to which the Constitution protects cultural pluralism. Economic, religious and other considerations make it impracticable for the Amish to establish a conventional parochial school system on the secondary school level leaving them with no alternative, should this Court refuse to accept jurisdiction, but to send their children into the public high schools as they now attend the public elementary schools. Appellant kept his daughter out of public high school because he felt that in the view of his church excessive contact with modern education would divert her from Amish religious and farm life (R. 12). It is quite possible that if all Amish children were compelled by law to attend public schools until the age of sixteen, on the threshold of both marital and college life, the result would be the assimilation of the Amish youth and the consequent disappearance of the Amish community and culture.[8]

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6. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950).

7. Immigration Act of 1965.

8. The fear of assimilation was a major factor in the establishment of the Catholic parochial school system and remains today the most frequently asserted reason for the maintenance of the Jewish day school system.

We are aware, of course, that where the welfare of children is concerned this Court has followed a policy of allowing the legislative branch of government wide discretion even where First Amendment rights are asserted. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *People* v. *Donner*, 199 Misc. (N.Y.) 643, affirmed 278 App. Div. 705, affirmed 302 N.Y. 857, appeal dismissed, 342 U. S. 884 (1951). Nevertheless, the Court has not accepted the claim of child welfare as an insurmountable barrier to constitutional scrutiny of compulsory cultural unification. Child welfare considerations were asserted in the foreign language cases (*Meyer* v. *Nebraska, supra*; *Stainback* v. *Po, supra*) as they were in *Pierce* v. *Society of Sisters, supra*.[9]

It is not necessary at this point to suggest how these competing claims of cultural pluralism and child welfare should be judicially resolved. It is sufficient for the purposes of this brief to urge that this conflict of claims pre-

9. In the *Pierce* case the state attorney general argued before this Court:

> "The voters of Oregon who adopted this law had the right to act on the belief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence. The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers. * * *"

sents a question of national importance which should be resolved and that definitive resolution can only come from this Court.

2. The Issue of Privacy

There is a second issue of importance implicit in this appeal, and that is the conflict between the claims of welfare and privacy. The Court recognized in *Prince* v. *Massachusetts, supra*, that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations which the state can neither supply nor hinder." The Court also recognized, of course, that "the family itself is not beyond regulation in the public interest" and that the rights of parenthood are not beyond limitation.

It is hardly disputable that standards of public interest and public welfare have been advancing and continue to advance. We are living in what is in good part a welfare state. Compulsory school attendance originally envisioned only sufficient schooling to master the basic elements of education necessary to prepare children to be able later to earn a livelihood. Later it was extended to encompass a full elementary school career and today reaches completion of secondary school or attainment of the age of sixteen. It is by no means impossible that within the next decade or two it may extend through college or attainment of the age of twenty-one.

This Court has understandably manifested in recent years a great reluctance to interfere with legislative discre-

tion in the arena of social welfare. Yet such discretion may not be constitutionally unlimited, at least where it collides with familial privacy. See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). The Court is not here faced with a case where parental sovereignty directly and immediately threatens the health, security or welfare of a child as where the parents allow it to engage in adult labor or deprive it of needed medical attention (*Prince* v. *Massachusetts, supra; People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, certiorari denied 344 U. S. 824 [1952]). There is nothing in the record to support an inference that Amish children are less happy or secure than those raised in conventional religions. We do not therefore have here a case where the circumstances clearly call for state intrusion into the privacy of the family as the only means of preventing grave injury to children.

The right of privacy, the right to be left alone, is precious in a democratic society. The Constitution protects freedom of association (*National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 [1958]); can it be said that it does not protect equally the right of non-association? The effect of the statute as applied in this case is to compel Amish children to associate with non-Amish during their school years up to the age of sixteen. The rationale of *Pierce* v. *Society of Sisters, supra*, is that such compulsory association is constitutionally impermissible. If the State of Kansas may compel Amish of the ages of fourteen and fifteen to associate with other children within the four walls of a school building six hours a day and five days a week, why may the State of Oregon not compel Catholic children to associate with non-Cath-

olics within the four walls of a public school building during the same period of time?

In the Amish community the family is a closely knit, cohesive unit. It impinges upon the rights of no other individual or group. It asks only to be let alone. No doubt many Americans consider it an anachronistic vestige of primitive simple society. Yet, can it be summarily held that its right to be left alone is entitled to no constitutional protection? Can it be summarily held that the power of the welfare state to intrude upon the privacy of the family is subject to no constitutional limitation? Whatever may be the ultimate resolution of the issue, we submit that it should not be disposed of summarily and that accordingly probable jurisdiction should be noted.

3. The Issue of Freedom

The most obvious issue raised in this appeal is of course that of the limits of religious freedom. "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare," the Kansas Supreme Court said in its opinion, "has never been condoned in the name of religious freedom" (Jurisdictional Statement, p. 31). Although the court did not cite *Minersville School District* v. *Gobitis* (310 U. S. 486 [1940]), it echoed that decision wherein Mr. Justice Frankfurter said (at 594-595):

> * * * The religious liberty which the Constitution protects has never excluded legislation of a general scope not directed against doctrinal loyalties of particular sects. * * * Conscientious scruples have not, in the course of the long struggle for religious toleration,

> relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities * * *

Yet, if these are the limits of constitutionally protected religious liberty there would be no need for the free exercise clause. Restrictions upon the expression of religious beliefs would be forbidden by the freedom of speech guaranty. *Schneider* v. *Irvington*, 308 U. S. 147 (1939). A law aimed at the restriction of religious conduct generally would be forbidden by the mandate of neutrality toward religion in the establishment clause (*Everson* v. *Board of Education*, 330 U. S. 1 [1947]) and one directed against a particular sect would violate both that clause and the equal protection guaranty. *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).[10]

It may well be the unique function of the free exercise clause to protect those whose particular religious beliefs forbid compliance with the demands of a general, secular law not deemed objectionable by adherents of the conventional faiths. Decisions which have rejected claims of unconstitutional infringement upon the free exercise of religion are justifiable not on the ground that the First Amendment may never require exemptions from general non-discriminatory welfare laws, but because of a para-

10. While the equal protection clause is not expressly applicable to the Federal government, this Court has consistently stricken down Federal action which if it had been that of the states would have violated the equal protection clause. See *Hurd* v. *Hodge*, 334 U. S. 24 (1948). *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Schneider* v. *Rusk*, 377 U. S. 163 (1964).

mount, overriding societal need, such as preservation of the monogomous family society (*Reynolds* v. *United States*, 98 U. S. 145 [1878]) or national defense (*Hamilton* v. *Regents of California*, 293 U. S. 245 [1934]).

When this Court held that a state could constitutionally forbid Sabbatarians from engaging in secular business on Sundays it did not do so on the ground that religious exemptions from welfare laws may never be required by the First Amendment but that they are not required where the burden on religious observance is indirect and the State cannot accomplish its welfare purpose except by imposing the burden. *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). In the present case the burden is direct (as it would have been in *Braunfeld* if the State law compelled affirmative conduct on Saturday rather than merely forbade secular conduct on Sunday) and it can hardly be adjudicated summarily that Kansas cannot accomplish its welfare purpose except by requiring Amish children to remain within the four walls of a school six hours a day and five days a week until they attain the age of sixteen.

In any event, it is not correct to say that "failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom." The South Carolina unemployment compensation law and the Minnesota jury service law certainly imposed "reasonable requirements in the exercise of the police power for the general welfare", and in both instances this Court has condoned noncompliance for reasons of conscience. *Sherbert* v. *Verner*, *supra*; *In re Jenison*, *supra*.

It is clear, we submit, that the religious freedom question raised in this appeal is substantial, no less substantial than those raised in *Sherbert* and *Jenison*. We submit, too, that it is an important question affecting as it does the religious conscience and perhaps survival of what the trial court found to be "a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial" (Jurisdictional Statement, p. 45). The question, we suggest, is too substantial and too important to be disposed of summarily.

Conclusion

For the foregoing reasons probable jurisdiction should be noted in this case.

Respectfully submitted,

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